

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

Joint Application of

**UNITED AIR LINES, INC.,  
BRITISH MIDLAND AIRWAYS LIMITED,  
AUSTRIAN AIRLINES, ÖSTERREICHISCHE  
LUFTVERKEHRS AG,  
LAUDA AIR LUFTFAHRT AG,  
DEUTSCHE LUFTHANSA AG,  
and  
SCANDINAVIAN AIRLINES SYSTEM**

**Docket OST-01-10575**

under 49 U.S.C. §§ 41308 and 41309 for approval and  
antitrust immunity for an Alliance Expansion Agreement  
and an Amended Coordination Agreement

**MOTION OF DEUTSCHE LUFTHANSA AG  
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

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(Lufthansa German Airlines)

**DATED: October 18, 2001**

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
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**UNITED AIR LINES, INC.,  
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Deutsche Lufthansa AG ("Lufthansa"), pursuant to Rule 12 of the Department's Rules of Practice (14 C.F.R. § 302.12), requests that the Department withhold from public disclosure documents that Lufthansa is filing herewith under seal in the above-captioned proceeding. These documents contain confidential, proprietary and commercially sensitive information. Lufthansa is submitting these documents to facilitate the Department's processing of the joint application of Lufthansa, United Air Lines, Inc., British Midland Airways Limited, doing business as bmi British Midland, Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, and Scandinavian Airlines System, and their respective affiliates, for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement. In support of this request, Lufthansa submits the following:

I. LUFTHANSA'S CONFIDENTIAL DOCUMENTS ARE PROTECTED FROM PUBLIC DISCLOSURE BY THE FREEDOM OF INFORMATION ACT.

Lufthansa is voluntarily submitting documents in this proceeding to facilitate the Department's expeditious processing of the Joint Application. (An index of Lufthansa's confidential documents is attached hereto.) These documents, produced by Lufthansa in consultation with attorneys from the undersigned law firm, are confidential and proprietary.

These documents are protected from public disclosure under various exemptions to the Freedom of Information Act ("FOIA"), including 5 U.S.C. §§ 552(b)(3) and (b)(4). Exemption 3 protects from disclosure information specifically protected by another federal statute, including 49 U.S.C. § 40115. See British Airports Authority v. CAB, 531 F. Supp. 408, 414 (D.D.C. 1982). Section 40115 states that the Department "shall" withhold from public disclosure, among other things, information that would adversely affect an air carrier's competitive position in foreign air transportation. The materials at issue here clearly satisfy this standard. They contain extremely sensitive information, including Lufthansa views on its competitive and strategic positions. These materials have not been made publicly available. This information could be used by Lufthansa's competitors to their strategic advantage, and Lufthansa's disadvantage, in making competitive decisions.<sup>1</sup>

Exemption 4 protects from public disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or

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<sup>1</sup> The Department has found that Exemption 3 also applies to information protected by 49 U.S.C. § 46311. See Order 2001-10-2, at 2-3. That statutory provision prohibits the release of information acquired by the Department "when inspecting the records of an air carrier" or information that "is withheld from disclosure under section 40115." 49 U.S.C. § 46311(a).

confidential." Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1980) (citations omitted). All the documents at issue here clearly satisfy this standard. All are commercial or financial in nature; they were obtained from a private citizen; and are privileged or confidential. Lufthansa would suffer substantial competitive harm if the documents were publicly disclosed. See Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (defining the standard for whether a document is privileged or confidential). Public disclosure of such information could "'impair the Government's ability to obtain necessary information in the future or . . . cause substantial harm to the competitive position of the person from whom the information was obtained.'" National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 677-78 (D.C. Cir. 1976) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765-70 (D.C. Cir. 1974)); Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510-11 (D. Kansas 1984).

II. ACCESS TO LUFTHANSA'S CONFIDENTIAL AND PROPRIETARY DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS.

Due to the nature of the documents Lufthansa has filed, Rule 12 access should be limited to counsel and outside experts who file an affidavit stating that they will: (1) use the information only for the purpose of participating in this proceeding; and (2) not disclose the information to anyone other than counsel or outside experts who have filed a valid affidavit with the Department.

The documents Lufthansa has filed under Rule 12 contain highly sensitive commercial information relating to international strategy, performance and planning. In

order to protect Lufthansa's ability to compete effectively in international markets, it is imperative that this information not be disseminated to Lufthansa's competitors, even under Rule 12 procedures. In recent years, the Department has routinely limited Rule 12 access to such data filed in the course of antitrust proceedings to counsel and outside experts.<sup>2</sup> The Department also has adopted such procedures with respect to the pending American Airlines/British Airways and Delta Air Lines/Air France/Alitalia/Czech Airlines applications for antitrust immunity. See Notice dated August 16, 2001 (Dockets OST-01-10387, 01-10388); Notice dated August 21, 2001 (Docket OST-01-10429). By limiting access in this manner, the Department can permit parties to fully participate in this proceeding while limiting the risk of competitive harm that would result if the information were disseminated to Lufthansa's competitors.

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<sup>2</sup> See, e.g., Joint Application of United/Austrian/Lauda/Lufthansa/SAS (Docket OST-00-7828), Notice Granting Access to Confidential Documents (September 15, 2000); Joint Application of American Airlines, Inc. and the TACA Group (Docket OST-00-7088), Notice Granting Access to Confidential Documents (April 7, 2000); Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., KLM Royal Dutch Airlines and Northwest Airlines, Inc. (Docket OST-1999-5674), *Scheduling Notice and Initial Determination on Motion for Confidential Treatment Under 14 C.F.R. 302.39* (July 19, 1999); and Joint Application of United Air Lines, Inc. and Air Canada (Docket OST-96-1434), Notice Granting Access to Documents (July 11, 1997).

WHEREFORE, for the foregoing reasons, the Department should grant Lufthansa's motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that Lufthansa has filed under seal; limit Rule 12 access to counsel and outside experts as described above; and grant such other and further relief as the Department deems necessary.

Respectfully submitted,



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**Dated: October 18, 2001**

**Deutsche Lufthansa AG**  
**Index to Confidential Documents**

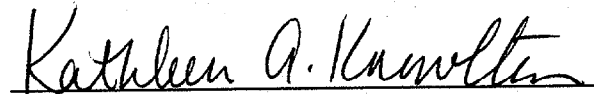
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LH 000010 - 000028	6/7/99	Star Alliance Area Forum North America	2
LH 000029 - 000039	1/14/00	Automatic Matching Guideline Summary	2
LH 000040 - 000050	1/24/00	Pricing goals for Germany point of sale	2
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**Additional Documents:**

Exhibit C to Joint Applicants' letter dated October 18, 2001 (Lufthansa's O&D traffic data)

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing Motion of Deutsche Lufthansa AG on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

  
Kathleen A. Knowlton

**DATED: October 18, 2001**

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